Office-Supreme Court, U.S.
FILED
OCT 5 1984
ER L. STEVAS,
CLERK

NO. 84-408

IN THE

Supreme Court of the United States

OCTOBER 1984 TERM

CLEAR-VIEW CABLE, T.V., INC.
APPELLANT

v.

TOWN OF NARROWS,
APPELLEE

ON APPEAL FROM THE SUPREME COURT OF VIRGINIA

MOTION TO DISMISS

COUNSEL FOR APPELLEE
James E. Cornwell, Jr., Esq.
124 Tazewell Street
P. O. Drawer D
Pearisburg, Virginia 24134
(703) 921-4740

APPELLATE PRINTING SERVICES, INC., HERITAGE BLDG., RICHMOND, VA (804) 643-7789

BEST AVAILABLE COPY

28 pp

I. QUESTIONS PRESENTED BY THIS MOTION

Your Appellee herein, the Town of Narrows, respectfully moves this Honorable Court to dismiss the appeal of this cause upon the following grounds:

1. THAT THE APPELLANT HAS NOT COMPLIED WITH THE RULES OF THE UNITED STATES SUPREME COURT, SPECIFICALLY RULE 10 AS IT PERTAINS TO THE REQUIRED NOTICE OF APPEAL.

2. THAT THE APPEAL DOES NOT INVOLVE A SUBSTANTIAL FEDERAL QUESTION.

3. THAT THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED IN THE SUPREME COURT OF VIRGINIA AND WAS NOT EXPRESSLY PASSED ON.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE CASE..... 1

ARGUMENT..... 8

CONCLUSION..... 23

CERTIFICATE..... 24

TABLE OF AUTHORITIES

Cardinale v. Louisiana, 394 U.S. 437, (1968) 18

Head v. New Mexico Board of Examiners of Optometry, 374 U.S. 424, (1959) 10

Honeyman v. Hanan, 300 U.S. 14, (1937) 19

The City of Los Angeles v. Los Angeles Gas and Electric Corp., 251 U.S. 32, (1919) 15

Public Service Commission of Puerto Rico v. Havemeyer, 296 U.S. 506, (1935) 12, 13, 17

Tacon v. Arizona, 410 U.S. 351, (1973) 18

Webb v. Webb, 451 U.S. 493, (1981) 20

STATEMENT OF THE CASE

References in parentheses are to the page number of the Appendix in the Virginia Supreme Court. This appendix is a part of the record in the Supreme Court of Virginia.

Clear-View Cable T.V., Inc. had been operating a cable T.V. system in the Town of Narrows for a number of years, at first as a successor to and assignee of Giles TV Cable, Inc. who had been granted a franchise on April 9, 1968 (App. I) and later pursuant to its own franchise which had been granted by an ordinance to be effective January 1, 1976 (App. 9). Both franchise ordinances provided the following language:

> Section 26-Forfeiture of Franchise: A. In addition to all other rights and powers pertaining to the Town by virtue of this franchise or otherwise, the Town reserves the

right to terminate and cancel this franchise and all rights and privileges of the grantee hereunder in the event that the grantee:

(1) Violates any provision of this Franchise or any rule, order or determination of the Town or Town Council made pursuant to this Franchise, except where such violation, other than of Section 21 or subsection (2) below, is without fault or through excusable neglect;

(2) Becomes insolvent, unable or unwilling to pay its debts, or is adjudged a bankrupt;

(3) Attempts to dispose of any of the facilities or property of its CATV business to prevent the Town from purchasing the same as provided for herein;

(4) Attempts to evade any of the provisions of this Franchise or practices any fraud or deceit upon the Town;

b. Such termination and cancellation shall be by ordinance duly adopted after thirty (30) days notice to the grantee and shall in no way affect any of the Town's rights under this Franchise or any provision of law. In the event that such termination and cancellation depends upon a finding of fact such finding of fact as made by the Town Council or its representative shall be conclusive. Provided, however, that

before this Franchise may be terminated and cancelled under this Section, the grantee must be provided with an opportunity to be heard before the Town Council.

There had been various complaints concerning the operation and reception of the signal from the cable system. After various complaints by many people within the town limits of the Town of Narrows, and others who were connected with the system, Council decided that some action must be taken to either improve the system or to declare that Clear-View Cable T.V., Inc. was in violation of Section 9A of the original franchise ordinance. Section 9A provided as follows:

> The grantee shall render efficient service, make repairs promptly and interrupt service only for good cause and for the shortest time possible. Such interruptions, insofar as possible, shall be preceded by notice and shall occur during periods of minimum use of the system.

On September 15, 1980, the Town Council of the Town of Narrows called a special meeting to consider action on the franchise. Notice of this meeting was served upon the President of Clear-View Cable TV, Inc. thirty (30) days prior to the meeting as required in the franchise agreement. The meeting was properly called to order and all Council members were present along with the Mayor, Town Manager, Secretary and the Town Attorney. Clear-View Cable TV, Inc. appeared by and was represented by Harry Anglin, its President. In the Town meeting, various citizens were recognized and allowed to state their complaints concerning the service rendered by the cable company. Mr. Anglin was allowed rebuttal time at the end of each speaker and at the end of the

meeting as a whole. As the Virginia Supreme Court found at Page 5 of its opinion, Mr. Anglin was "sarcastic, argumentative, and evasive when responding to legitimate questions."

Upon motion by Councilman Plummer, duly seconded and passed unanimously, the Council passed an ordinance revoking and terminating the franchise of Clear-View Cable TV, Inc. for the reasons as set forth in that ordinance which appears in the appendix (App. 145). The entire transcript of the public hearing is also in the Appendix at Page 52.

The remaining actions pertaining to the legal process are as set forth in the statement of the case by the Appellant. The Supreme Court of Virginia did award the Town a writ of err-

or to the decision of the Circuit Court of Giles County denying the petition for writ of mandamus and on April 27, 1984 reversed the Circuit Court judgment and directed the Circuit Court of Giles County to issue the mandamus prayed for by the Town.

The Town had argued in both the Circuit Court of Giles County and the Supreme Court of Virginia that its actions were done pursuant to the franchise ordinance and the right of forfeiture retained by the Town for violation of a condition thereof. Both the Town and Clear-View argued before the Supreme Court concerning the action of the Town. The Court quoted from the Clear-View brief at Page 9 of its opinion the following rule of law submitted by Clear-View:

> Where a municipality seeks to revoke or cancel the franchise of its franchisee, it is a question of law for the Court to decide whether the municipality acted reasonably, lawfully and based its decision on facts drawn from competent evidence.

The Town argued in its brief, also quoted on Page 9 of the Court's opinion, the following:

> The Court may review the Town's decision to determine if the process or decision was performed according to the law and the franchise agreement, was not reached in an arbitrary or capricious manner, or was a product of fraud or collusion.

As the Court set forth in Page 9 of its opinion, both Clear-View and the Town of Narrows agreed as to the application of law to the proceeding before the Supreme Court of Virginia.

ARGUMENT

1. THAT THE APPELLANT HAS NOT COMPLIED WITH THE RULES OF THE UNITED STATES SUPREME COURT, SPECIFICALLY RULE 10 AS IT PERTAINS TO THE REQUIRED NOTICE OF APPEAL.

The purported notice of appeal is set forth on page 49 of the Appellant's Appendix to his Jurisdictional statement. Rule 10 provides that such notice specify the parties taking the appeal, the judgment or part thereof appealed from, giving the date of its entry and specify the statute or statutes under which the appeal to this Court is taken.

It is plain that the purported notice of appeal fails to comply with this rule either in form or substance. The notice to the Court indicates

Appellee's intention to seek a writ of certiorari from this Court. It, by its express terms, is not a notice of appeal

The notice fails to advise the judgment or part thereof being appealed from or give the date of its entry. Indeed from a reading of the notice, it can be reasonably concluded the order involved is the order denying the petition for re-hearing.

Most importantly, the notice fails to specify the statute or statutes under which the appeal to this Court is taken. The appellee indicates that the jurisdiction for appeal is based on 28 U.S.C. §1257 and Article I, Section 10 of the United States Constitution. No statement to that effect was included in the notice as required by Rule 10 of this Court. It is submitted that the notice filed was given to avoid the mandate to

be handed down by the Supreme Court of Virginia requiring the Appellant to cease operations so as to prolong this litigation and continue the Appellant's operation. This Court has previously held that it will not consider argument not made in state court below and not reserved in the notice of appeal. Head v. New Mexico Board of Examiners of Optometry (1963) 374 U.S. 424, 108 2d 983, 83 S. Ct. 1959.

2. THAT THE APPEAL DOES NOT INVOLVE A SUBSTANTIAL FEDERAL QUESTION.

The Appellant contends that the questions he presents are substantial because of its contention that the Virginia Supreme Court applied the wrong level of scrutiny to the basis for the revocation of the franchise. The Appellant proposes that by deciding this matter this Court would clarify the

level of scrutiny required and the kind of factual basis necessary to allow a municipality to cancel a franchise. The Appellant ignores that the ordinance granting the franchise and which it claims constitutes a contract, expressly governs the cancellation of the franchise.

The issue in this case before the Supreme Court of Virginia concerned the operation of that reserved power to the Town. The parties before that Court as indicated in that Court's opinion on Page 43 of the Appellant's appendix had no disagreement on the standard to govern the municipalities actions. The Appellant now contends the Court should have used a different standard.

The issue of termination of franchise rights was considered by this Court in the 1935 decision of Public Service

Commission of Puerto Rico v. Havemeyer, 296 U.S. 506, 80 L. Ed. 357. The situation involved therein was the revocation of a franchise pursuant to an implied power to revoke due to the failure of the franchise to comply with a duty voluntarily contracted by them in accepting the franchise. The Court upheld that revocation by its language at 296 U.S. 515:

> Implied in every grant of franchise is the condition that it may be lost by misuse. Every such special privilege is subject to termination for breach of condition, whether express or implied, upon which the grant depends. It may be cancelled or withdrawn by any procedure that is not repugnant to the established principles of justice. The initial step need not be a suit for mandamus, quo warranto, injunction or the like. Essential requirements are satisfied if the withdrawal of the privilege, declared by legislative or executive authority, may be followed by appeal to a Court of compentent jurisdiction in which the rights of the holders may be determined.

The cancellation involved in the franchise granted to the Appellant differs from that considered in Havemeyer, most importantly in that the right to revoke the same was expressly reserved and the method of revocation was plainly set forth in the franchise agreement with the Appellant.

The Appellant relies on three more recent cases of this Court to support its contention that the Virginia Court used the wrong standard to judge the action of the Town of Narrows. None of these cases involve franchise agreements between public bodies and private entities or cancellation thereof. The cases are plainly distinguishable to the issues herein involved.

In the matter now being argued, the municipality owns the property over which the right was granted, in trust

for the public. The Appellant contends that the franchise issued by the Town was a contract. The Appellee not only concedes that the franchise is a contract but relies upon that argument to uphold the cancellation thereof.

3. THAT THE FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WAS NOT TIMELY OR PROPERLY RAISED IN THE SUPREME COURT OF VIRGINIA AND WAS NOT EXPRESSLY PASSED ON.

The Appellant claims in his jurisdictional statement that the impairment of contract issue was raised in the Supreme Court of Virginia and points to his brief before said Court on Pages 17 and 18. A review of Page 17 and 18 of the Appellant's brief before the Supreme Court of Virginia indicates that the only language discussing the same concerns a discussion of the case of The

City of Los Angeles v. Los Angeles Gas and Electric Corp., 251 U.S. 32, 40 Supreme Court 76, (1919), wherein the case was synopsized as it pertains to the situation therein in which the City Council of Los Angeles took action concerning the electric corporation's franchise agreement. The purpose of this case as cited and the quotation taken from the case was for the purpose of demonstrating to the Court that a franchise agreement is a contract and not for the purpose of raising the issue that the Town of Narrows did violate the constitutional amendment prohibiting impairment of contracts. The appendix in the Supreme Court includes a copy of the answer of Clear-View Cable TV, Inc. to the petition for writ of mandamus by the Town of Narrows filed in the Circuit Court of Giles County.

Nowhere in that answer is the impairment of the contract theory raised before the Circuit Court of Giles County. Before that, on Page 44 of the Appendix, the Bill for injunctive relief filed by Clear-View Cable TV, Inc. against the Town of Narrows is printed. Again, no impairment of contract theory is raised in the Circuit Court of Giles County. Both the Appellant and the Appellee briefed the Supreme Court of Virginia on the applicable law and questions pres ented to the Court. The questions presented are listed on Page 6 of the Appellant's brief and Page 2 of the Appellee's brief, and in neither place was the impairment of contract theory listed as a issue on appeal to the Court.

The strongest argument that the Appellant has that he raise the impair-

ment theory is the language in his brief on Page 19. This language is within the section of the Appellant's brief which argues the question of whether the Circuit Court of Giles County properly reviewed the decision of the Council of the Town of Narrows, Virginia to terminate the franchise agreement. The Appellee had raised the issue that the actions of the Town Council of the Town of Narrows were legislative actions and, therefore, not subject to judicial review unless arbitrary capricious or unreasonable, citing to the Court the Havemeyer case for that proposition. This is the only place in any documents submitted to the Court where the issue of impairment of contract

theory is raised, and then it is simply referred to but not argued. The issue was never raised or mentioned in the opinion of Virginia Supreme Court or in the order of the Circuit Court of Giles County.

The Supreme Court of the United States has consistently held that it:

> ...will not decide federal constitutional issues raised here for the first time on review of State Court decisions.

Cardinale v. Louisiana 394 U.S. 437, 438 (1968).

In Tacon v. Arizona 410 U.S. 351, 352 (1973), this Court stated, in dismissing the writ of certiorari as improvidentally granted, "that it appears that these broad issues were not raised by the petitioner below or passed upon by the Arizona Supreme Court. We cannot decide issues raised for the first time

here." The cases are consistent with this decision in Honeyman v. Hanan, 300 U.S. 14, 18-19 (1937), that it "...must appear affirmatively from the record, not only that the federal question was presented to the highest Court of this state having jurisdiction but that its decision of the federal question was necessary to the determination of the cause."

More recently, this Court has reiterated this question, in holding that it was without jurisdiction to grant certiorari, where the Georgia Supreme Court had failed to rule on the federal issue raised by the petitioner there, as follows:

> At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were

> apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.

Webb v. Webb, 451 U.S. 493, 502 (1981).

The record in this case fails to show that the appellant herein affirmatively raised the issue of impairment of contract or that there was an explici and timely insistence by the appellant in the state court that this action by the Town Council of the Town of Narrows impaired the contractual agreement in effect between the Town of Narrows and the Appellant. The mere fact that it was mentioned in passing in the argument of whether or not there existed a contract between the parties hereto

should not be considered by this Court as having raised the issue in such manner that the Supreme Court of Virginia resolved the issue against the appellant.

Indeed, the Virginia Supreme Court, in its opinion as previously quoted on Page 9 thereof, sets forth the issue before the Supreme Court of Virginia and the parties positions thereon.

> The parties actually do not disagree about an application of the foregoing general principles of this proceeding. The Town argues that the Court may review the Town's decision to determine if the process of decision was performed according to the law and the franchise agreement, was not reached in an arbitrary or capricious manner, or was the product of fraud or collusion."Clearview says that where a municipality seeks to revoke or cancel the franchise of its franchisee, is a question of law for the Court to decide whether a municipality acted reasonably, lawfully and based its decision on facts drawn from competent evidence. Consequently, the basic question for the trial Court, upon review-

ing the legislative action, was to decide whether the action of the Town Council was reasonable.

It is plain from the record before the Circuit Court of Giles County and the Supreme Court of Virginia that the Appellant herein did not raise the issue of impairment of contract so as to properly set before this Court that issue for determination. The issue before both Courts was the issue of whether or not, under the facts and law, the action of the Town Council was reasonable pursuant to the facts or whether it was reached in an arbitrary or capricious manner. The Supreme Court found, on the facts of this case, that the decision was reasonable and proper and that Court's decision should not be reversed.

CONCLUSION

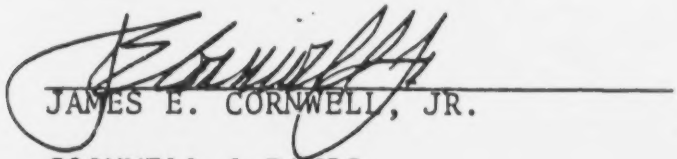
For all the above reasons, including failure of the Appellant to comply with the rules of this Court, for lack of a substantial federal question and failure of the Appellant to timely or properly raise the issue now presented in the state courts, the Appellee respectfully moves this court to dismiss this proported appeal.

CERTIFICATE OF SERVICE

This is to certify that in accordance with Rule 28 of the Rules of the Supreme Court, I have on this day served the required three (3) copies of the Motion to Dismiss by depositing same in a United States Mail box with First-Class postage prepaid and addressed to the following attorney for Appellant:

Philip G. Gardner, Esq.
Gardner, Gardner & Barrow
10 N. Bridge Street
P. O. Box 552
Martinsville, VA 24114-0552

This 4th day of October, 1984.



JAMES E. CORNWELL, JR.

CORNWELL & DAVIS
Attorneys at Law
P. O. Drawer D
Pearisburg, VA 24134

Counsel for Appellee